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PROVISIONS OF THE PRELIMINARY DRAFT CONVENTION ON
JURISDICTION AND FOREIGN JUDGEMENTS IN
CIVIL AND COMMERCIAL MATTERS

prepared by the International Bureau

I. INTRODUCTION

1. At its last session which took place in Geneva on November 8 to 12, 1999, the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) took note of the information presented by the International Bureau on the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (“Preliminary Draft Convention”)¹ which has been prepared by the Hague Conference on Private International Law (“Hague Conference”).

2. With regard to issues of jurisdiction for proceedings arising from the use of trademarks on the Internet, the SCT agreed not to pursue these matters in depth, but instead to monitor the developments within the Hague Conference regarding the Preliminary Draft Convention. It was agreed that the International Bureau would prepare a paper for the next session of the SCT, which outlined the provisions of the Preliminary Draft Convention in relation to jurisdiction concerning the validity or infringement of trademark rights. On the basis of this paper, the SCT would, at its next meeting, discuss whether the International Bureau should convey a position paper to the Hague Conference regarding the implications for trademarks of the Preliminary Draft Convention.²

3. This paper presents the provisions of the Preliminary Draft Convention (including proposed amendments) which appear to be most relevant for proceedings involving trademark rights. The Annex contains the most recent version of the Preliminary Draft Convention.

II. THE RELEVANT PROVISIONS

1. Article 3: Defendant’s Forum

4. Article 3 of the Preliminary Draft Convention grants general jurisdiction to the courts of the defendant’s forum.³ These courts are thus competent to deal with all claims the plaintiff might have against the defendant, such as infringement claims concerning trademarks, including trademarks protected in several countries.

5. Article 3 of the Preliminary Draft Convention reads as follows:

“Article 3 Defendant’s forum

1. Subject to the provisions of the Convention, a defendant may be sued in the courts of the State where that defendant is habitually resident.

2. For the purposes of the Convention, an entity or person other than a natural person shall be considered to be habitually resident in the State -

a) where it has its statutory seat,

¹ See documents SCT/3/3 and SCT/3/3 Corr.

² See Summary by the Chair, SCT/3/9, paragraph 7, and Report, SCT/3/10, paragraph 25.

³ See document SCT/2/9, paragraphs 40, 41 and 46 to 48, document SCT/3/3, paragraph 25.

- b) under whose law it was incorporated or formed,
- c) where it has its central administration, or
- d) where it has its principal place of business.”

2. Article 10: Torts or Delicts

6. Article 10 of the Preliminary Draft Convention grants specific jurisdiction⁴ for actions in tort or delict to the courts in the State in which the defendant acted or in which the injury occurred. Paragraphs 1 and 3 of Article 10 read as follows:

“Article 10 Torts or delicts

1. A plaintiff may bring an action in tort or delict in the courts of the State -

- a) in which the act or omission that caused injury occurred, or
- b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.

(...)

3. A plaintiff may also bring an action in accordance with paragraph 1 when the act or omission, or the injury may occur.

(...)”

7. It would seem that, in trademark infringement proceedings, subparagraphs a) and b) could regularly lead to the same State, namely the State in which the allegedly infringed trademark is protected. The reason for this is that the exclusive right conferred by a trademark is territorial in nature and can be infringed only in the territory in which it is protected. As a consequence, relevant acts under subparagraph a) would seem to be only such acts which can be deemed to have taken place in the State where the trademark right is protected. Similarly, the relevant injury under subparagraph b) would only occur in the State where the trademark is protected.

8. Due to these particular features of trademark rights, it appears questionable whether the limitation to “foreseeable injury” contained in subparagraph b) would be effective in cases of trademark infringement because, even if the defendant could not reasonably have foreseen that his acts might cause injury, i.e. a trademark infringement, in a particular State, the plaintiff could nevertheless rely on subparagraph a) which does not include such a limitation.

⁴ See documents SCT/2/9, paragraphs 40 to 42 and SCT/3/3, paragraphs 23 *et seq.*

9. Article 10, paragraph 4, contains a limitation regarding the scope of jurisdiction in tort actions:

“4. If an action is brought in the courts of a State only on the basis that the injury arose or may occur there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the injured person has his or her habitual residence in that State.”

10. It should be noted that this provision is limited to the ground of jurisdiction contained in paragraph 1 b). As with the limitation in paragraph 1 b), the effect of such a limitation with regard to actions for the infringement of trademark rights needs further consideration.

3. Article 12: Exclusive Jurisdiction

11. Of particular relevance for trademark law are paragraphs 4 to 6 of Article 12 of the Preliminary Draft Convention. The square brackets indicate proposals made at the last session of the Special Commission on Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters (“the Commission”), which took place in The Hague from October 25 to 30, 1999.

12. Article 12.4 confers exclusive jurisdiction for certain proceedings involving industrial property rights. This paragraph, therefore, excludes every other ground of jurisdiction, including general jurisdiction under Article 3 or specific jurisdiction under Article 10. Article 12.4 reads as follows:

“Article 12 Exclusive jurisdiction

(...)

4. In proceedings which have as their object the registration, validity, [or] nullity[, or revocation or infringement,] of patents, trade marks, designs or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or, under the terms of an international convention, is deemed to have taken place, have exclusive jurisdiction. This shall not apply to copyright or any neighbouring rights, even though registration or deposit of such rights is possible.”⁵

13. The square brackets indicate a proposal put forward by the Delegation of the United Kingdom at the last session of the Commission.⁶ The consequence of that proposal would seem to be that only the courts of the country where the industrial property right is registered have jurisdiction to hear infringement claims, while jurisdiction based on residence (Article 3 of the Preliminary Draft Convention) or the place of the tortious act or injury (Article 10 of the Preliminary Draft Convention) would be excluded.

⁵ Square brackets in original.

⁶ See Hague Conference on Private International Law, Working Document No 263 and 263 Corrigendum of 25 October 1999.

14. Paragraph 5 of Article 12 reflects a proposal put forward by the Delegation of Switzerland at the last session of the Commission and is, therefore, contained in square brackets.⁷ This paragraph, which apparently seeks to limit the effects of the proposal to amend paragraph 4, reads as follows:

“[5. In relation to proceedings which have as their object the infringement of patents, the preceding paragraph does not exclude the jurisdiction of any other court under the Convention or under the national law of a Contracting State.]”⁸

15. Paragraph 6, also contained in square brackets, was proposed by the Delegation of the United States of America and has not yet been adopted.⁹ This provision also attempts to limit the scope of exclusive jurisdiction. It reads as follows:

“[6. The previous paragraphs shall not apply when the matters referred to therein arise as incidental questions.]”¹⁰

III. FUTURE DEVELOPMENTS AND POSSIBLE ACTION BY THE SCT

16. The Hague Conference plans to convene a Diplomatic Conference in October 2000. There will be no further session of the Commission before that date. At its last session in October 1999, however, the Commission decided to set up a small group of experts, including specialists in intellectual property law, to clarify the factual situation as well as the legal implications of the Preliminary Draft Convention for proceedings involving intellectual property rights.

17. The SCT is invited to consider the consequences of the Preliminary Draft Convention for proceedings involving trademark rights, and to decide whether, in light of these consequences, it would be desirable for WIPO to convey a position paper to the Hague Conference.

[Annex follows]

⁷ See Hague Conference on Private International Law, Working Document No 269 of 26 October 1999.

⁸ Square brackets in original.

⁹ See Hague Conference on Private International Law, Working Document No 334 of 29 October 1999.

¹⁰ Square brackets in original.

**PRELIMINARY DRAFT CONVENTION ON JURISDICTION
AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS¹**

adopted by the Special Commission
on 30 October 1999

amended version (new numbering of articles)

CHAPTER I - SCOPE OF THE CONVENTION

Article 1 Substantive scope

1. The Convention applies to civil and commercial matters. It shall not extend in particular to revenue, customs or administrative matters.
2. The Convention does not apply to -
 - a) the status and legal capacity of natural persons;
 - b) maintenance obligations;
 - c) matrimonial property regimes and other rights and obligations arising out of marriage or similar relationships;
 - d) wills and succession;
 - e) insolvency, composition or analogous proceedings;
 - f) social security;
 - g) arbitration and proceedings related thereto;
 - h) admiralty or maritime matters.
3. A dispute is not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any other person acting for the State is a party thereto.

¹ The Special Commission has considered whether the provisions of the preliminary draft Convention meet the needs of e-commerce. This matter will be further examined by a group of specialists in this field who will meet early in the year 2000.

4. Nothing in this Convention affects the privileges and immunities of sovereign States or of entities of sovereign States, or of international organisations.

Article 2 Territorial scope

1. The provisions of Chapter II shall apply in the courts of a Contracting State unless all the parties are habitually resident in that State. However, even if all the parties are habitually resident in that State –

- a) Article 4 shall apply if they have agreed that a court or courts of another Contracting State have jurisdiction to determine the dispute;
- b) Article 12, regarding exclusive jurisdiction, shall apply;
- c) Articles 21 and 22 shall apply where the court is required to determine whether to decline jurisdiction or suspend its proceedings on the grounds that the dispute ought to be determined in the courts of another Contracting State.

2. The provisions of Chapter III apply to the recognition and enforcement in a Contracting State of a judgment rendered in another Contracting State.

CHAPTER II – JURISDICTION

Article 3 Defendant's forum

1. Subject to the provisions of the Convention, a defendant may be sued in the courts of the State where that defendant is habitually resident.

2. For the purposes of the Convention, an entity or person other than a natural person shall be considered to be habitually resident in the State –

- a) where it has its statutory seat,
- b) under whose law it was incorporated or formed,
- c) where it has its central administration, or
- d) where it has its principal place of business.

Article 4 Choice of court

1. If the parties have agreed that a court or courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, and that jurisdiction shall be exclusive unless the parties have agreed otherwise. Where an agreement having exclusive

effect designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction.

2. An agreement within the meaning of paragraph 1 shall be valid as to form, if it was entered into or confirmed –

- a) in writing;
- b) by any other means of communication which renders information accessible so as to be usable for subsequent reference;
- c) in accordance with a usage which is regularly observed by the parties;
- d) in accordance with a usage of which the parties were or ought to have been aware and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned.

3. Agreements conferring jurisdiction and similar clauses in trust instruments shall be without effect if they conflict with the provisions of Article 7, 8 or 12.

Article 5 Appearance by the defendant

1. Subject to Article 12, a court has jurisdiction if the defendant proceeds on the merits without contesting jurisdiction.

2. The defendant has the right to contest jurisdiction no later than at the time of the first defence on the merits.

Article 6 Contracts

A plaintiff may bring an action in contract in the courts of a State in which –

- a) in matters relating to the supply of goods, the goods were supplied in whole or in part;
- b) in matters relating to the provision of services, the services were provided in whole or in part;
- c) in matters relating both to the supply of goods and the provision of services, performance of the principal obligation took place in whole or in part.

Article 7 Contracts concluded by consumers

1. A plaintiff who concluded a contract for a purpose which is outside its trade or profession, hereafter designated as the consumer, may bring a claim in the courts of the State in which it is habitually resident, if

- a) the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity, and
- b) the consumer has taken the steps necessary for the conclusion of the contract in that State.

2. A claim against the consumer may only be brought by a person who entered into the contract in the course of its trade or profession before the courts of the State of the habitual residence of the consumer.

3. The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of court –

- a) if such agreement is entered into after the dispute has arisen, or
- b) to the extent only that it allows the consumer to bring proceedings in another court.

Article 8 Individual contracts of employment

1. In matters relating to individual contracts of employment –

- a) an employee may bring an action against the employer,
 - i) in the courts of the State in which the employee habitually carries out his work or in the courts of the last State in which he did so, or
 - ii) if the employee does not or did not habitually carry out his work in any one State, in the courts of the State in which the business that engaged the employee is or was situated;
- b) a claim against an employee may be brought by the employer only,
 - i) in the courts of the State where the employee is habitually resident, or
 - ii) in the courts of the State in which the employee habitually carries out his work.

2. The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of court –

- a) if such agreement is entered into after the dispute has arisen, or
- b) to the extent only that it allows the employee to bring proceedings in courts other than those indicated in this Article or in Article 3 of the Convention.

Article 9 Branches [and regular commercial activity]

A plaintiff may bring an action in the courts of a State in which a branch, agency or any other establishment of the defendant is situated, [or where the defendant has carried on regular commercial activity by other means,] provided that the dispute relates directly to the activity of that branch, agency or establishment [or to that regular commercial activity].

Article 10 Torts or delicts

1. A plaintiff may bring an action in tort or delict in the courts of the State –

- a) in which the act or omission that caused injury occurred, or
- b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.

2. Paragraph 1 *b)* shall not apply to injury caused by anti-trust violations, in particular price-fixing or monopolisation, or conspiracy to inflict economic loss.

3. A plaintiff may also bring an action in accordance with paragraph 1 when the act or omission, or the injury may occur.

4. If an action is brought in the courts of a State only on the basis that the injury arose or may occur there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the injured person has his or her habitual residence in that State.

Article 11 Trusts

1. In proceedings concerning the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, the courts of a Contracting State designated in the trust instrument for this purpose shall have exclusive jurisdiction. Where the trust instrument designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction.

2. In the absence of such designation, proceedings may be brought before the courts of a State –
- a) in which is situated the principal place of administration of the trust;
 - b) whose law is applicable to the trust;
 - c) with which the trust has the closest connection for the purpose of the proceedings.

Article 12 Exclusive jurisdiction

1. In proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated have exclusive jurisdiction, unless in proceedings which have as their object tenancies of immovable property, the tenant is habitually resident in a different State.
2. In proceedings which have as their object the validity, nullity, or dissolution of a legal person, or the validity or nullity of the decisions of its organs, the courts of a Contracting State whose law governs the legal person have exclusive jurisdiction.
3. In proceedings which have as their object the validity or nullity of entries in public registers, the courts of the Contracting State in which the register is kept have exclusive jurisdiction.
4. In proceedings which have as their object the registration, validity, [or] nullity[, or revocation or infringement,] of patents, trade marks, designs or other similar rights required to be deposited or registered, the courts of the Contracting State in which the deposit or registration has been applied for, has taken place or, under the terms of an international convention, is deemed to have taken place, have exclusive jurisdiction. This shall not apply to copyright or any neighbouring rights, even though registration or deposit of such rights is possible.
- [5. In relation to proceedings which have as their object the infringement of patents, the preceding paragraph does not exclude the jurisdiction of any other court under the Convention or under the national law of a Contracting State.]
- [6. The previous paragraphs shall not apply when the matters referred to therein arise as incidental questions.]

Article 13 Provisional and protective measures

1. A court having jurisdiction under Articles 3 to 12 to determine the merits of the case has jurisdiction to order any provisional or protective measures.

2. The courts of a State in which property is located have jurisdiction to order any provisional or protective measures in respect of that property.
3. A court of a Contracting State not having jurisdiction under paragraphs 1 or 2 may order provisional or protective measures, provided that –
 - a) their enforcement is limited to the territory of that State, and
 - b) their purpose is to protect on an interim basis a claim on the merits which is pending or to be brought by the requesting party.

Article 14 Multiple defendants

1. A plaintiff bringing an action against a defendant in a court of the State in which that defendant is habitually resident may also proceed in that court against other defendants not habitually resident in that State if –
 - a) the claims against the defendant habitually resident in that State and the other defendants are so closely connected that they should be adjudicated together to avoid a serious risk of inconsistent judgments, and
 - b) as to each defendant not habitually resident in that State, there is a substantial connection between that State and the dispute involving that defendant.
2. Paragraph 1 shall not apply to a codefendant invoking an exclusive choice of court clause agreed with the plaintiff and conforming with Article 4.

Article 15 Counter-claims

A court which has jurisdiction to determine a claim under the provisions of the Convention shall also have jurisdiction to determine a counter-claim arising out of the transaction or occurrence on which the original claim is based.

Article 16 Third party claims

1. A court which has jurisdiction to determine a claim under the provisions of the Convention shall also have jurisdiction to determine a claim by a defendant against a third party for indemnity or contribution in respect of the claim against that defendant to the extent that such an action is permitted by national law, provided that there is a substantial connection between that State and the dispute involving that third party.
2. Paragraph 1 shall not apply to a third party invoking an exclusive choice of court clause agreed with the defendant and conforming with Article 4.

Article 17 Jurisdiction based on national law

Subject to Articles 4, 5, 7, 8, 12 and 13, the Convention does not prevent the application by Contracting States of rules of jurisdiction under national law, provided that this is not prohibited under Article 18.

Article 18 Prohibited grounds of jurisdiction

1. Where the defendant is habitually resident in a Contracting State, the application of a rule of jurisdiction provided for under the national law of a Contracting State is prohibited if there is no substantial connection between that State and the dispute.

2. In particular, jurisdiction shall not be exercised by the courts of a Contracting State on the basis solely of one or more of the following –

- a) the presence or the seizure in that State of property belonging to the defendant, except where the dispute is directly related to that property;
- b) the nationality of the plaintiff;
- c) the nationality of the defendant;
- d) the domicile, habitual or temporary residence, or presence of the plaintiff in that State;
- e) the carrying on of commercial or other activities by the defendant in that State, except where the dispute is directly related to those activities;
- f) the service of a writ upon the defendant in that State;
- g) the unilateral designation of the forum by the plaintiff;
- h) proceedings in that State for declaration of enforceability or registration or for the enforcement of a judgment, except where the dispute is directly related to such proceedings;
- i) the temporary residence or presence of the defendant in that State;
- j) the signing in that State of the contract from which the dispute arises.

3. Nothing in this Article shall prevent a court in a Contracting State from exercising jurisdiction under national law in an action [seeking relief] [claiming damages] in respect of conduct which constitutes –

[Variant One:

- [a) genocide, a crime against humanity or a war crime[, as defined in the Statute of the International Criminal Court]; or]
- [b) a serious crime against a natural person under international law; or]
- [c) a grave violation against a natural person of non-derogable fundamental rights established under international law, such as torture, slavery, forced labour and disappeared persons].

[Sub-paragraphs [b) and] c) above apply only if the party seeking relief is exposed to a risk of a denial of justice because proceedings in another State are not possible or cannot reasonably be required.]

Variant Two:

a serious crime under international law, provided that this State has established its criminal jurisdiction over that crime in accordance with an international treaty to which it is a party and that the claim is for civil compensatory damages for death or serious bodily injury arising from that crime.]

Article 19 Authority of the court seised

Where the defendant does not enter an appearance, the court shall verify whether Article 18 prohibits it from exercising jurisdiction if –

- a) national law so requires; or
- b) the plaintiff so requests; or
- [c) the defendant so requests, even after judgment is entered in accordance with procedures established under national law; or]
- [d) the document which instituted the proceedings or an equivalent document was served on the defendant in another Contracting State.]

or

- [d) it appears from the documents filed by the plaintiff that the defendant's address is in another Contracting State.]

Article 20

1. The court shall stay the proceedings so long as it is not established that the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, or that all necessary steps have been taken to that effect.

[2. Paragraph 1 shall not affect the use of international instruments concerning the service abroad of judicial and extrajudicial documents in civil or commercial matters, in accordance with the law of the forum.]

[3. Paragraph 1 shall not apply, in case of urgency, to any provisional or protective measures.]

Article 21 Lis pendens

1. When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 or 12.

2. The court second seised shall decline jurisdiction as soon as it is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under the Convention.

3. Upon application of a party, the court second seised may proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.

4. The provisions of the preceding paragraphs apply to the court second seised even in a case where the jurisdiction of that court is based on the national law of that State in accordance with Article 17.

5. For the purpose of this Article, a court shall be deemed to be seised –

- a) when the document instituting the proceedings or an equivalent document is lodged with the court, or
- b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant.

[As appropriate, universal time is applicable.]

6. If in the action before the court first seised the plaintiff seeks a determination that it has no obligation to the defendant, and if an action seeking substantive relief is brought in the court second seised –

- a) the provisions of paragraphs 1 to 5 above shall not apply to the court second seised, and
- b) the court first seised shall suspend the proceedings at the request of a party if the court second seised is expected to render a decision capable of being recognised under the Convention.

7. This Article shall not apply if the court first seised, on application by a party, determines that the court second seised is clearly more appropriate to resolve the dispute, under the conditions specified in Article 22.

Article 22 Exceptional circumstances for declining jurisdiction

1. In exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 12, the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defence on the merits.

2. The court shall take into account, in particular –

- a) any inconvenience to the parties in view of their habitual residence;
- b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;
- c) applicable limitation or prescription periods;
- d) the possibility of obtaining recognition and enforcement of any decision on the merits.

3. In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.

4. If the court decides to suspend its proceedings under paragraph 1, it may order the defendant to provide security sufficient to satisfy any decision of the other court on the merits. However, it shall make such an order if the other court has jurisdiction only under Article 17, unless the defendant establishes that sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced.

5. When the court has suspended its proceedings under paragraph 1,
 - a) it shall decline to exercise jurisdiction if the court of the other State exercises jurisdiction, or if the plaintiff does not bring the proceedings in that State within the time specified by the court, or
 - b) it shall proceed with the case if the court of the other State decides not to exercise jurisdiction.

CHAPTER III - RECOGNITION AND ENFORCEMENT

Article 23 Definition of "judgment"

For the purposes of this Chapter, "judgment" means –

- a) any decision given by a court, whatever it may be called, including a decree or order, as well as the determination of costs or expenses by an officer of the court, provided that it relates to a decision which may be recognised or enforced under the Convention;
- b) decisions ordering provisional or protective measures in accordance with Article 13, paragraph 1.

Article 24 Judgments excluded from Chapter III

This Chapter shall not apply to judgments based on a ground of jurisdiction provided for by national law in accordance with Article 17.

Article 25 Judgments to be recognised or enforced

1. A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, or which is consistent with any such ground, shall be recognised or enforced under this Chapter.
2. In order to be recognised, a judgment referred to in paragraph 1 must have the effect of *res judicata* in the State of origin.
3. In order to be enforceable, a judgment referred to in paragraph 1 must be enforceable in the State of origin.
4. However, recognition or enforcement may be postponed if the judgment is the subject of review in the State of origin or if the time limit for seeking a review has not expired.

Article 26 Judgments not to be recognised or enforced

A judgment based on a ground of jurisdiction which conflicts with Articles 4, 5, 7, 8 or 12, or whose application is prohibited by virtue of Article 18, shall not be recognised or enforced.

Article 27 Verification of jurisdiction

1. The court addressed shall verify the jurisdiction of the court of origin.
2. In verifying the jurisdiction of the court of origin, the court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.
3. Recognition or enforcement of a judgment may not be refused on the ground that the court addressed considers that the court of origin should have declined jurisdiction in accordance with Article 22.

Article 28 Grounds for refusal of recognition or enforcement

1. Recognition or enforcement of a judgment may be refused if –
 - a) proceedings between the same parties and having the same subject matter are pending before a court of the State addressed, if first seised in accordance with Article 21;
 - b) the judgment is inconsistent with a judgment rendered, either in the State addressed or in another State, provided that in the latter case the judgment is capable of being recognised or enforced in the State addressed;
 - c) the judgment results from proceedings incompatible with fundamental principles of procedure of the State addressed, including the right of each party to be heard by an impartial and independent court;
 - d) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence;
 - e) the judgment was obtained by fraud in connection with a matter of procedure;
 - f) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.
2. Without prejudice to such review as is necessary for the purpose of application of the provisions of this Chapter, there shall be no review of the merits of the judgment rendered by the court of origin.

Article 29 Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce –
 - a) a complete and certified copy of the judgment;
 - b) if the judgment was rendered by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
 - c) all documents required to establish that the judgment is *res judicata* in the State of origin or, as the case may be, is enforceable in that State;
 - d) if the court addressed so requires, a translation of the documents referred to above, made by a person qualified to do so.
2. No legalisation or similar formality may be required.
3. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require the production of any other necessary documents.

Article 30 Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the State addressed so far as the Convention does not provide otherwise. The court addressed shall act expeditiously.

Article 31 Costs of proceedings

No security, bond or deposit, however described, to guarantee the payment of costs or expenses shall be required by reason only that the applicant is a national of, or has its habitual residence in, another Contracting State.

Article 32 Legal aid

Natural persons habitually resident in a Contracting State shall be entitled, in proceedings for recognition or enforcement, to legal aid under the same conditions as apply to persons habitually resident in the requested State.

Article 33 Damages

1. In so far as a judgment awards non-compensatory, including exemplary or punitive, damages, it shall be recognised at least to the extent that similar or comparable damages could have been awarded in the State addressed.
2.
 - a) Where the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages have been awarded, recognition may be limited to a lesser amount.
 - b) In no event shall the court addressed recognise the judgment in an amount less than that which could have been awarded in the State addressed in the same circumstances, including those existing in the State of origin.
3. In applying paragraph 1 or 2, the court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 34 Severability

If the judgment contains elements which are severable, one or more of them may be separately recognised, declared enforceable, registered for enforcement, or enforced.

Article 35 Authentic instruments

1. Each Contracting State may declare that it will enforce, subject to reciprocity, authentic instruments formally drawn up or registered and enforceable in another Contracting State.
2. The authentic instrument must have been authenticated by a public authority or a delegate of a public authority and the authentication must relate to both the signature and the content of the document.
- [3. The provisions concerning recognition and enforcement provided for in this Chapter shall apply as appropriate.]

Article 36 Settlements

Settlements to which a court has given its authority shall be recognised, declared enforceable or registered for enforcement in the State addressed under the same conditions as judgments falling within the Convention, so far as those conditions apply to settlements.

CHAPTER IV - GENERAL PROVISIONS

Article 37 Relationship with other conventions

[See annex]

Article 38 Uniform interpretation

1. In the interpretation of the Convention, regard is to be had to its international character and to the need to promote uniformity in its application.
2. The courts of each Contracting State shall, when applying and interpreting the Convention, take due account of the case law of other Contracting States.

Article 39

1. Each Contracting State shall, at the request of the Secretary General of the Hague Conference on Private International Law, send to the Permanent Bureau at regular intervals copies of any significant decisions taken in applying the Convention and, as appropriate, other relevant information.
2. The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission to review the operation of the Convention.
3. The Commission may make recommendations on the application or interpretation of the Convention and may propose modifications or revisions of the Convention or the addition of protocols.]

Article 40

1. Upon a joint request of the parties to a dispute in which the interpretation of the Convention is at issue, or of a court of a Contracting State, the Permanent Bureau of the Hague Conference on Private International Law shall assist in the establishment of a committee of experts to make recommendations to such parties or such court.
- [2. The Secretary General of the Hague Conference on Private International Law shall, as soon as possible, convene a Special Commission to draw up an optional protocol setting out rules governing the composition and procedures of the committee of experts.]]

Article 41 Federal clause

ANNEX

Article 37 Relationship with other conventions

Proposal 1

1. The Convention does not affect any international instrument to which Contracting States are or become Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.
2. However, the Convention prevails over such instruments to the extent that they provide for fora not authorized under the provisions of Article 18 of the Convention.
3. The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned and to instruments adopted by a community of States.

Proposal 2

1.
 - a) In this Article, the Brussels Convention [as amended], Regulation [...] of the European Union, and the Lugano Convention [as amended] shall be collectively referred to as "the European instruments".
 - b) A State party to either of the above Conventions or a Member State of the European Union to which the above Regulation applies shall be collectively referred to as "European instrument States".
2. Subject to the following provisions [of this Article], a European instrument State shall apply the European instruments, and not the Convention, whenever the European instruments are applicable according to their terms.
3. Except where the provisions of the European instruments on –
 - a) exclusive jurisdiction;
 - b) prorogation of jurisdiction;
 - c) *lis pendens* and related actions;
 - d) protective jurisdiction for consumers or employees;

are applicable, a European instrument State shall apply Articles 3, 5 to 11, 14 to 16 and 18 of the Convention whenever the defendant is not domiciled in a European instrument State.

4. Even if the defendant is domiciled in a European instrument State, a court of such a State shall apply –

- a)* Article 4 of the Convention whenever the court chosen is not in a European instrument State;
- b)* Article 12 of the Convention whenever the court with exclusive jurisdiction under that provision is not in a European instrument State; and
- c)* Articles 21 and 22 of this Convention whenever the court in whose favour the proceedings are stayed or jurisdiction is declined is not a court of a European instrument State.

Note: Another provision will be needed for other conventions and instruments.

Proposal 3

5. Judgments of courts of a Contracting State to this Convention based on jurisdiction granted under the terms of a different international convention ("other Convention") shall be recognised and enforced in courts of Contracting States to this Convention which are also Contracting States to the other Convention. This provision shall not apply if, by reservation under Article ..., a Contracting State chooses –

- a)* not to be governed by this provision, or
- b)* not to be governed by this provision as to certain designated other conventions.

[End of Annex and of document]